A

PP

v.

ABDUL KASIM BRAHIM

B

HIGH COURT SABAH & SARAWAK, BINTULU
JOHN KO WAI SENG JC
[CRIMINAL APPEAL NO: BTU-41-01-2011]
12 AUGUST 2011

C ***CRIMINAL PROCEDURE:*** *Appeal - Appeal against decision of Magistrate - Respondent discharged and acquitted based on preliminary objection - Whether learned Magistrate erred in fact and law*

ROAD TRAFFIC: *Offences - Creation of offences - Road Traffic Rules 1959 ('the RT Rules') - Whether merely a guideline to conduct* D *investigation - Respondent charged under r. 3(2)(b) Road Traffic Rules 1959 - Whether r. 3(2)(b) must be read together with s. 119(1) Road Transport Act 1987 - Whether offence created - Whether charge against respondent null and void*

E ***STATUTORY INTERPRETATION:*** *Subordinate legislation - Validity - Inconsistency between Act and Subsidiary legislation - Purpose of r. 3(2)(b) Road Traffic Rules 1959 - Whether served as guidance for road users - General penalty provided by s. 119(2) of Road Transport Act 1987 - Whether applicable for breach of Road Traffic Rules 1959*

F

The respondent was charged under r. 3(2)(b) of the Road Traffic Rules 1959 ('the RT Rules') which is punishable under s. 119(2) of the Road Transport Act 1987 ('the RTA'), for causing an accident by failing to give way to traffic travelling straight before G turning his lorry trailer on a public road. The learned Magistrate however, acquitted and discharged the respondent after hearing his preliminary objection against the said charge. Dissatisfied, the Public Prosecutor ('PP') appealed against the decision and contended that the learned Magistrate had erred in fact and law H when he: (i) concurred that the subsidiary legislation *ie*, the RT Rules did not provide for any offence but was merely a guideline to conduct investigations and to prove the prosecution's case; and (ii) held that the charge against the respondent was null and void. The PP further contended that the definition of 'this Act' under I s. 2 of the RTA includes any subsidiary legislation made under the

RTA. It was further argued that the RT Rules is deemed to be made pursuant to s. 88(1)(h) of the RTA and that breach of any Rule of the RT Rules is an offence punishable under the general penalty provided under s. 119(2) of the RTA. The issues to be determined were (i) whether there was a creation of offence in the RT Rules and (ii) whether breach of r. 3(2)(b) of the RT Rules, (which is now recognised as a scheduled offence by ss. 2, 23 and 46 of the Road Transport (Amendment) Act 2011 ('the amended Act') when it adopted the new First Schedule of the RTA), would affect only holders of a vocational licence, and had no retrospective effect to this case which occurred before the amendments were passed.

Held (allowing the PP's appeal):

(1) There was no necessity for the RTA to resort to s. 27 of the Interpretation Acts 1948 and 1967 since there is the general penalty provided by s. 119(2) of the RTA thereof. (para 12)

(2) The nature and purpose of the Rules under s. 88(1) of the RTA is to secure the safety of the public and road users which made it imperative as a matter of public policy to be all regulative, prohibitive, prescriptive and mandatory in nature for its breach to be enforceable by criminal punishment. As such, there is every intention evinced from the RTA that a breach of any of the RT Rules is to be made an offence through s. 119(1) and punishable under s. 119(2). Because of s. 119(1), it was deemed unnecessary and superfluous under the scheme of the RTA to specify again in the RT Rules that a breach of any of the Rules under s. 88 will be an offence. (*Cinnamond and Others v. British Airports Authority,* foll); and *Muhammed Hassan v. PP,* foll). (paras 16, 19, 20 & 24)

(3) The real code of conduct and guidance to road users is made by the gazetted Highway Code under s. 68 of the RTA. There is no issue in regulating the offences by the RT Rules because it had been shown without any ambiguity by the example of the Highway Code that a breach of the Code or Rules made by authority of the RTA is meant to be construed as an offence unless exempted by s. 68(3) thereof. (para 24)

(4) The offences listed under the First Schedule of the RTA are made scheduled offence to enable the operation of s. 56 of the RTA (as amended). Thus, the amended Act confirmed the

court's interpretation that the scheme of the RTA is to make a breach of its Rules to be an offence for its own purposes. Hence, breach of r. 3(2)(b) of the RT Rules is an offence under s. 119(1) and punishable under s. 119(2) of the RTA. The learned Magistrate had thus erred in fact and law when he held the charge to be null and void. (paras 27, 29 & 31)

Case(s) referred to:
Cinnamond and Others v. British Airports Authority [1980] 2 All ER 368 ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 27
Road Transport Act 1987, ss. 2, 67, 88(1)(h), 119(1), (2), 128
Road Transport (Amendment) Act 2011, ss. 2, 23, 46
Road Traffic Rules 1959, r. 3(2)(b)

For the appellant - Tuan Hairun Najmi Mashahadi DPP
For the respondent - Henry Ling; M/s Ling & Wong

Reported by Melanie Murthy

JUDGMENT

John Ko Wai Seng JC:

The Case

The Charge

[1] The respondent was charged for an offence under r. 3(2)(b) of Traffic Rule which punishable under s. 119(2) of Road Transport Act (Act 333).

[2] The charge reads as follows:

> Bahawa kamu pada 6 November 2010, jam lebih kurang 1040 Hrs, di Batu 32 Simpang Bakun, dalam daerah Bintulu, dalam Negeri Sarawak sebagai pemandu sebuah trailer yang bernombor pendaftaran QSS8566/QSP6351, telah memandu kenderaan tersebut diatas jalan raya awam dengan tidak memberi hak laluan menuju kehadapan sebelum membelok sehingga menyebabkan kemalangan jalanraya berhubung BTU/RPT/K002474/2010. Oleh itu kamu telah melakukan kesalahan di bawah Kaedah 3(2)(b) Kaedah-kaedah lalulintas (LN166/59) dan boleh dihukum di bawah seksyen 119(2) Akta Pengangkutan Jalan (Akta 333).

Hukuman: Denda tidak lebih RM2,000 atau Penjara tidak lebih 6 bulan atau kedua-duanya sekali.

(Loosely translated in English:

That you on 6/11/2010 at about 1040 hrs at Batu 32 Simpang Bakun, Bintulu in the State of as a driver of one lorry trailer bearing registration number QSS8566/QSP6351, had drove the trailer on the public road and failed to give way to traffic travelling straight ahead before turning which caused an accident pursuant to BTU/RPT/K002474/2010 and thereby you had committed an offence under Rule 3(2)(b) of Road Traffic Rules 1959 (LN166/59) and punishable under Section 119(2) of Road Transport Act 1987(Act 333).

Punishment: Fine of not more than RM2,000 or imprisonment of not less than 6 months or both.

The Acquittal And Appeal

[3] On 15 March 2011, the learned Magistrate had discharged and acquitted the respondent after hearing preliminary objection by learned respondent's counsel.

The Grounds Of Appeal

[4] The appellant was dissatisfied with the decision of the learned Magistrate based on the following grounds:

1. The learned Magistrate erred in fact and law when he concurred and agreed with the second issue of the preliminary objection ie, the subsidiary legislation (traffic rule) did not provide any offence but merely a guideline to conduct investigations and to prove a prosecution's case.
2. The learned Magistrate erred in fact and law when he held that the charge is null and void.

The Issues

First Ground: Breach Of A Subsidiary Legislation

(a) Road Traffic Rules 1959 (LN166/59) (RT Rules): No Offence Created

[5] Learned DPP for the appellant submitted that the learned Magistrate erred in fact and law when he concurred and agreed with the second issue of the preliminary objection ie, the subsidiary

legislation (traffic rule) did not provide any offence but merely guideline to conduct investigations and to prove a prosecution's case.

[6] The appellant submitted that s. 119(2) of the Road Transport Act 1987 (Act 333) (RT Act) provides for an offence without any specific penalty under the Act will still be punishable by the general penalty it provides and this provision reads as follows:

> Any person who is guilty of an offence under this Act shall, where no special penalty is provided, be liable in the case of a first conviction, to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months and, in the case of a second or subsequent conviction, to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

[7] Learned DPP contends that under s. 2 of the RT Act the definition of "This Act" is to include any subsidiary legislation made under the RT Act. The Road Traffic Rules 1959 (LN166/59) (RT Rules) is deemed to be made pursuant to s. 88(1)(h) of the RT Act and have force of law. If it has force of law, a breach of any rule of the RT Rules is an offence that can be punished under the general penalty provided by s. 119(2) of the RT Act.

[8] Learned counsel for the respondent pointed out that the RT Rules was expressly saved under s. 128 of the RT Act:

> **128. Repeal, transitional and saving**
>
> (1) The Road Traffic Ordinance 1958 and the Modification of Laws (Road Traffic Ordinance) (Extension and Modification) Order 1984 in so far as they do not relate to the licensing of commercial vehicles are hereby repealed:
>
> Provided that all subsidiary legislations made under the repealed Ordinance in so far as they do not relate to the licensing of commercial vehicles shall be deemed to have been made under this Act and shall continue to remain in force until amended or revoked thereunder:

[9] If the RT Rules is now "deemed to have been made under this Act" ie, RT Act and thereby comes under s. 88(1)(h) of the RTA which provides as follows:

> The Minister may make rules for any purpose for which rules may be made under this part and for prescribing anything which may be made prescribed under this Part, and generally for the purpose of carrying this part into effect and for regulating traffic on roads and relieving congestion and facilitating the providing for the safety of road users and without prejudice to the generality of the foregoing provisions, may make rules:
>
> (h) for prescribing rules as to the precedence to be observed as between traffic proceeding in the same direction, or in opposite directions, or when crossing;

[10] Which is what r. 3(2)(b) of the RT Rules did provide for as follows:

> (2) The driver of each and every vehicle when driven on a road shall:
>
> (a) Give right of way to traffic on or approaching from his right at any roundabout;
>
> (b) Give right of way to traffic travelling straight ahead before turning across the path of such traffic.

[11] The court also notes that under the Interpretation Acts 1948 and 1967 (Act 388), "subsidiary legislation" means that any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect. Section 27 of Interpretation Act 1948 and 1967 (Act 388) also provides that:

> Notwithstanding the absence of any express provision in any Act or other written law, subsidiary legislation may provide that contravention of any provision of the subsidiary legislation shall constitute an offence and for persons guilty of such offence to be liable on conviction to a fine or a term of imprisonment or both, but may not provide for any such fine to exceed one thousand ringgit or any such term to exceed six months.

[12] There does not need to be any necessity for the RT Act to resort to s. 27 of the Interpretation Act 1948 and 1967 (Act 388) since there is the general penalty provided by s. 119(2) of the RT Act.

[13] Learned counsel for the respondent submitted that no offence is created under r. 3(2)(b) of the RT Rules, it is just a code of conduct which does not amount to a criminal offence in law on breach and hence the respondent cannot be prosecuted for any offence even if there was any breach of r. 3(2)(b) of the RT Rules because in subsequent Rules made, they do specify that a breach is an offence eg:

(1) Rule 9 of the Road Traffic (School Crossing Patrol) Rules 1963 which was made under the repealed 1958 Ordinance provides as follows:

> Any person who fails to comply with rule 8 shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM100.00.

(2) Rule 10 of Motor Vehicles (Prohibition of Certain types of Glass) Rules 1991 which is made under the RTA 1987 states as follows:

> The registered owner or driver who contravenes any of the provisions of these Rules shall be guilty of an offence and shall on conviction be liable to:
>
> (a) To a fine nor exceeding RM500.00 or to imprisonment for a term not exceeding two weeks for a first offence; and
>
> (b) To a fine not exceeding RM1,000,00 or to imprisonment for a term not exceeding one month or to both for a subsequent offence.

[14] The court notes that a possible reason for the distinction in the above cited rules is because of the need to provide for a lower range of penalty for the prescribed offences that the Minister had thought it fit not to rely on the general penalty provided by s. 119(2) of the RT Act.

[15] Learned counsel for the respondent lastly submitted that over 67 sections under the RTA 1987 expressly create offences for specific types of conducts. However, at least 24 of them do not provide any special penalty for anyone who is guilty of an offence upon conviction. There are several examples of offences with specified penalty and no specified penalty stipulated in the RT Act punishable under s. 119(2) of RTA. For offences with no

specified penalty, it can be seen under s. 6 (Prohibition of motor vehicles not complying with rules), s. 12 (Inspection of motor vehicles and information to Director General), s. 20 (Display of motor vehicle) and many more. As for offences with penalty stipulated, it can be seen under several sections namely s. 7 (Registration of motor vehicles and owners), s. 14 (Display of registration number), s. 22 (Motor vehicle trade licenses) and etc.

[16] On the contrary to the submission of learned counsel for the respondent, the real code of conduct for guidance of persons using roads is made by the Highway Code under the RT Act made by the Minister. By s. 68(3) it is provided significantly an express reservation (in line with the respondent's submission as a guide) that the failure to observe the Highway Code so promulgated "shall not of itself render that person liable to criminal proceedings of any kind".

[17] This comes about because s. 119(1) of the RT Act specifically states:

> (1) Any person who:
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> (a) without lawful excuse, proof of which shall lie on him, refuses or neglects to do anything he is by this Act required to do;
>
> (b) ...
>
> **(c) without lawful excuse, proof of which shall lie on him, contravenes or fails to comply with any provisions of this Act, shall be guilty of an offence.** (emphasis added)

[18] In s. 2 of the RT Act the definition of "This Act" is to include any subsidiary legislation made under the RT Act which therefore includes the RT Rules.

[19] The court notes that the purpose of making the Rules under s. 88(1)(h) of the RT Act is for "regulating traffic on roads and relieving congestion and facilitating the **providing for the safety of road users**" (emphasis added). The Rules to be made under s. 88(1) of the RT Act in particular under subsection (h) for the safety of road users places them on a higher plane than the "guidance" purpose of the Highway Code. It becomes imperative

as a matter of public policy that such Rules to be made by the Minister under s. 88(1) of the RT Act for public safety being all regulative, prohibitive, prescriptive and mandatory in nature will have to be enforceable by criminal punishment on their breach in order to ensure public safety through their obedience. This creation of an offence for the Rules made is achieved through s. 119(1) of the RT Act. Recalling that under s. 68 of the RT Act the gazetting of the Highway Code implied that breach of such gazetted Rules under the RT Act will be an offence but relief was given by s. 68(3) of the RT Act which negated a breach of the Highway Code as an offence.

[20] In similar vein, s. 88(4) of the RT Act provides for specific provision to exempt from the Rules to take cognizance of s. 119(1) of the RT Act. If no offence is created by the Rules as contended by learned counsel for the respondent why should there be a need to provide for authority to exempt from the Rules made unless a breach of a Rule is already made an offence in the first place. Therefore the court is of the view that because of s. 119(1) RT Act it was deemed unnecessary and superfluous under the scheme of the RT Act to specify again in the Rules that a breach of any of the Rules made by the Minister under s. 88 of the RT Act will be an offence.

[21] Adopting the same approach of Lord Denning in the case *Cinnamond and Others v. British Airports Authority* [1980] 2 All ER 368 on challenge of the validity of bye-laws made where His Lordship observed at p. 373:

> ... It seems to me that the approach nowadays should be different in regard to modern byelaws. If the byelaw is of such a nature that something of this kind is necessary or desirable for the operation of the airport, then the courts should endeavour to interpret the byelaw so as to render it valid rather than invalid.
>
> The Latin maxim is *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void). *If it is drafted in words which on a strict interpretation may be said to be too wide, or to uncertain, or to be unreasonable, then the court, so long as the words permit it, should discard the strict interpretation and interpret them with any reasonable implications or qualifications which may be necessary so as to produce a just and proper result* ... (emphasis added)

[22] No doubt the *Cinnamond* case *(supra)* is not on the construction of a penalising law but the guiding approach is in the court's view just as applicable but subject to the following considerations on interpretation of penal statutes.

[23] In *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170, Chong Siew Fai CJ (Sabah & Sarawak) on the interpretation of the penal provisions said this at pp. 189d-190b:

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss. (d) and (da) of s. 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v. PP* [1968] 2 MLJ 1 PC; *PP v. Leong Kuai Hong* [1981] 1 MLJ 246 FC; see also *Stephenson v. Higginson* [1851] 3 HL Cas 638 where Lord Truro observed: (p. 686)
>
> > ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense, must plainly appear.

Chong Siew Fai CJ (Sabah & Sarawak) went on to state:

> Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the legislature. In *Magor and St. Mellons Rural District Council v. Newport Corp* [1952] AC 189 Lord Simonds observed (at p 191):
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> > The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited. If a gap is disclosed, the remedy lies in an amending Act.

[24] Applying these principles the court will construe that the nature of the RT Rules are made to secure the safety of the public and road users and as such there is every intention evinced from the RT Act that a breach of any of these RT Rules is to be made an offence through s. 119(1) of the RT Act and punishable under s. 119(2) of the RT Act. The question becomes: Why was there a need to regulate them by the RT Rules in the first place unless it is meant to be an offence on breach. In so doing the

court is not creating an offence by filling in a "casus omissus" by reference to s. 119(1) and (2) of the RT Act because it has been shown without any ambiguity by the example of the Highway Code that a breach of the Code or Rules made by authority of the RT Act is meant to be construed as an offence unless exempted like the Highway Code through s. 68(3) of the RT Act.

(b) The Road Transport (Amendment) Act 2011

[25] According to learned counsel for the respondent a breach of r. 3(2)(b) of the RT Rules is now recognised as a scheduled offence by ss. 2, 23 and 46 of the Road Transport (Amendment) Act 2011 by its insertion into a new First Schedule ("scheduled offence") into the RT Act. Learned counsel for the respondent pointed out that this has no application here as it only applies to the holder of a vocational licence (driver of a public service or goods carrier) and has no retrospective effect to this case which had happened before the amendments were passed.

[26] The court would note that the tenor of the amendment through ss. 2, 23 and 46 of the Road Transport (Amendment) Act 2011 also lends weight to the court's interpretation that breach of r. 3(2)(b) of RT Rules is an offence under the RT Act. The First Schedule (scheduled offence) to RTA 1987 inserted by s. 46 of the Road Transport (Amendment) Act 2011 is as follows:

First Schedule

[Section 2]

Scheduled Offence

Item	Types of Offence (1)	Provision of the law (2)
i	Driving above the speed limit	Rule 3, Motor Vehicles (speed Limit) Rules 1989 [P.U. (A) 25/1989]
ii	Failure to comply with traffic sign	Subsection 79(2) of this Act
iii	Overtaking at double lines Act	Subsection 79(2) of this
iv	Driving in emergency lanes	Rule 53 of Road Traffic Rules 1959 [L.N. 166/ 1959]

v	Overtaking and preventing another from overtaking	Rule 6 of Road Traffic Rules 1959 [L.N. 166/ 1959]
vi	Queue-jumping	Rule 3(2)(b) of Road Traffic Rules 1959
vii	Using mobile phones while driving	Rule 17A of Road Traffic Rules 1959 [L.N. 166/ 1959]

[27] It would be noted that items, (i) (ii) and (iii) in the First Schedule are already made offences under the RT Act, thereby implying that items (iv), (v), (vi) and (vii) are also already made offences under the RT Act in order to be designated as a scheduled offence. These listed offences are now made scheduled offences to enable the operation of s. 56 of the RT Act (as amended) for the Director for Transport to "limit the validity period of a vocational licence to a period not exceeding three months if he is satisfied that the holder of the vocational licence has any outstanding matter or case regarding any scheduled offence …"

[28] In other words, if a bus or truck driver has breached r. 3(2)(b) of RT Rules and thereby has committed an offence under the RTA, then by the amended s. 56 of the RT Act, this is now a scheduled offence which may cause his licence to be curtailed to three months life.

[29] There is no question that the Road Transport (Amendment) Act 2011 confirms the court's interpretation that the scheme of the RT Act is to make a breach of its Rules to be an offence for the purposes of the RT Act.

Second Ground: Void Charge

[30] The appellant submitted that the learned Magistrate erred in fact and law when he held that the charge is null and void. The respondent contends otherwise that the charge is null and void because no offence is committed by a breach of the RT Rules.

[31] Based on the above finding that a breach of r. 3(2)(b) of the RT Rule is an offence under s. 119(1) and punishable under s. 119(2) of the RT Act, the learned Magistrate had erred in fact and law when he held that the charge is null and void.

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Conclusion

[32] The court will allow the appellant's appeal and the decision of the learned Magistrate on the preliminary objection is reversed and that the case be re-instated and remitted back to the
B Magistrate Court for continuation of the trial of the charge against the respondent.

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